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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; JESSE ANTHONY GONZALEZ, Real Party in Interest.	E050165 (Super.Ct.No. RIF152139) OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. James T. Warren, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Petition granted.

Rod Pacheco, District Attorney, and Matt Reilly, Deputy District Attorney, for Petitioner.

No appearance for Respondent.

Scott B. Well for Real Party in Interest.

INTRODUCTION

In this matter, we have reviewed the petition and the opposition filed by defendant/real party in interest. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is, therefore, appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

DISCUSSION

We agree with real party in interest that the evidence does not show any "additional provocative act" as the term is used in the cases. (See, e.g., *People v. Briscoe* (2001) 92 Cal.App.4th 568, 583.) However, consistent with our ruling in *People v. Gallegos* (1997) 54 Cal.App.4th 453 [Fourth Dist., Div. Two] (*Gallegos*), we find that in this case no such additional act was needed. This is because, under a reasonable view of the evidence, the assault led by defendant and focusing on the actual perpetrator of the killing itself carried a "high probability . . . of eliciting a life-threatening response." (*Briscoe*, at p. 582.) Although at trial it is possible that the jury may find that the incident, as defendant suggests, was more of a "schoolyard brawl," the testimony at the preliminary hearing also supports the view that it was a mass attack, on a badly-outnumbered object of the attack, by a group of youths with a propensity for violence. It is reasonable to conclude that the attack was highly likely to cause the object of the attack to respond with defensive extreme violence.

As we noted in *Gallegos*, if the original crime is itself violent and assaultive, to require an "additional . . . provocative act" before culpability under the doctrine can be imposed, would allow the instigators of defensive killings to escape responsibility in many instances. (*Gallegos*, *supra*, 54 Cal.App.4th at pp. 459-461.) It is true that, as defendant points out, both *Gallegos* and the earlier case of *In re Aurelio R.* (1985) 167 Cal.App.3d 52, reaching a similar result, involved assaults with a firearm.

However, the principle is simply that when a defendant commits a crime that involves a high risk of inciting defensive violence, no *additional* conduct is required before the "provocative act" doctrine can be applied with respect to a killing by the original victim. This principle does not depend on the nature of the crime, whether it involves a gun, knife, machete, or simply overwhelming numbers. Whether the principle applies depends on the totality of the circumstances facing the original victim. In this case, we conclude that the evidence was sufficient to justify a holding order on the murder charge, and that the trial court erred in believing, as a matter of law, that some act in addition to the mass attack had to be established.

DISPOSITION

Accordingly, the petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the Superior Court of Riverside County to vacate its order dismissing the charge under Penal Code section 187 against petitioner, and to enter a new order holding real party in interest to answer on that charge.

The previously ordered stay is lifted.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.